

a

YAP KEE SEONG

v.

TEGUH BINA SDN. BHD.

HIGH COURT MALAYA, SHAH ALAM

MAHADEV SHANKAR J

b

[SUIT NO. 22- 56- 89]

11 DECEMBER 1989

c

CONTRACT: *Claim for monies due under sub contract - Assignment of main contract - Application by sub contractor to freeze all monies due to former main contractor - Application for mareva injunction - Monies to be held in suspense account until disputes are resolved - Right of main contractor to withhold sums to satisfy claims against sub-contractor.*

d

Teguh Bina Sdn. Bhd (Teguh) the defendants were appointed main contractors to construct terrace houses by the Perbadanan Setiausaha Negeri Selangor (SSI). By another agreement, Teguh sub-contracted the site clearance and earth filling works under the main contract to the plaintiffs, Soon Huat.

e

Subsequently, the defendants entered into an agreement with Merpatiputeh Constructions Sdn. Bhd. whereby the entire main contracts were assigned by the defendants to Merpatiputeh with the consent of SSI.

The plaintiffs Soon Huat claim that Teguh had failed to pay their progress claims as and when they fell due and now applied to freeze any monies due to the defendant from SSI until the trial of the action. They claim that it is necessary to enable them to obtain satisfaction from the defendants and to prevent the money from being dissipated. The issue in this case was whether the defendants had billed SSI for the work done by the plaintiffs and whether any provisions had been made for the plaintiffs claim.

*f***Held:**

[1] Teguh the defendants have not indicated in its affidavit that it had made any provision for the plaintiff's claim.

[2] Further, the defendant's denial of liability has not been supported by any documentary evidence that there are any serious disputes as to the quality of the plaintiff's performance while the work was in progress.

g

[3] In the circumstances, the defendants are restrained from receiving any further monies due to it from SSI until it has deposited the sum of RM159,106.89 into Court or alternatively gives security for the said sum to the satisfaction of the plaintiff, such payment or security to abide the trial of this action or further order.

h

[4] The parties however shall be at liberty to apply because the plaintiff may now apply for summary judgment since it is a claim for a liquidated sum and the respective merits of the parties can be tested if necessary by cross-examination before it is decided on what terms the defendant should be given leave.

[5] If the leave obtained is unconditional the defendant can of course have the present order vacated.

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[This order of the Court is subject to the plaintiff's undertaking as to damages. Costs to be in the cause.]

For the plaintiffs - L.E. Tan; M/s. L.E. Tan & Co.

For the defendants - N.S. Selvam; M/s. Siva Wong & Jamal

JUDGMENT

Mahadev Shankar J:

Teguh Bina Sdn. Bhd. (Teguh) were appointed the main contractors to construct 267 units of terrace houses and carry out the works related thereto at Kapar Town, Kelang by the Perbadanan Setiausaha Negeri Selangor (herein after referred to as the SSI). This agreement is hereafter referred to as the main contract.

By another agreement (the sub-contract) dated 12 November 1987, Teguh sub-contracted the site clearance, and earth filling works under the main contract to the plaintiffs (Soon Huat). Soon Huat claims that from the inception of the sub-contract up to about mid-May 1989, they carried out the works under the sub-contract to the value of RM437,106.89. As against this they received payments from time to time up to that date in the sum of RM278,000 leaving a balance due of RM159,106.89. Soon Huat claims it stopped work in mid-May 1989, because Teguh failed to pay their progress claims as and when they fell due.

From the documents before me it is apparent that on 14 November 1988, Soon Huat had submitted a claim for 82,184.85 cubic metres of earth filled at the site at RM4.45 per cubic metre making a total claim of RM365,722.58. With the additional claim of RM12,350 for site clearance Soon Huat's total claim less RM260,000 received by way of part payment towards account, their nett claim was for RM118,072.58 at that time. There is documentary evidence before me that by 10 January 1989 Teguh had received RM596,000 towards account from the SSI. It is a reasonable inference on the evidence before me that this money covered the works done by Soon Huat.

In November and December 1988, there was a problem about the levels of the earth filled which had to be reduced according to the directions of the SSI's engineers which was given in a letter of the Jabatan Perumahan Negara on 14 October 1988. This together with bad weather in November and December 1988, appears to have resulted in a temporary stoppage of the work.

From a letter of Soon Huat dated 13 January 1989, it seems that subject to the payment of their progress claims which then stood at RM118,072.88 they were prepared to resume work. The entries on this letter suggest that they did receive a payment of RM8,000 on 3 February and a further RM12,000 on 15 February 1989. The evidence also shows that Soon Huat did resume work but in mid-May 1989, they stopped because they were simply not getting any money for the work already done. Up to the time of stoppage Soon Huat's claim for the total earth filled was 95,178.52 cubic metres. In other words since mid-November 1988 till stoppage in mid-May 1989, Soon Huat had put in another 12,933.67 cubic metres which at RM4.45 works out to RM57,821.84.

There is also evidence before me that on 31 March 1989, Teguh submitted a claim in writing to the SSI for payment for 106,221.16 cubic metres. Nowhere in the affidavit of Teguh's director has he denied this document nor has he sought to explain in his affidavit how or why Teguh was billing for more than the actual work done in terms of quantities. The full implications of this can be gone into at the appropriate time. I am unable to understand Teguh's Counsel's submission that the difference represents Teguh's profit margin which Teguh was entitled to make on the main contract because profit margins are usually calculated

a on a mark-up on the price not on differences in the actual quantity of goods supplied. However since the greater must include the less it seems to me to be a reasonable inference that Teguh has in fact billed the SSI for the work done by Soon Huat.

b On 27 September 1989, Teguh entered into an agreement with Merpatiputeh Constructions Sdn. Bhd. whereby the balance of the entire main contract was assigned by Teguh to Merpatiputeh with the consent of the SSI (the assignment). The assignment recites that Teguh has completed works to the extent of RM919,679.23 out of which a balance of RM323,679.23 remains to be paid by SSI to Teguh.

c It is this assignment which appears to have precipitated the present application. Soon Huat is claiming that if the money for the work they claim to have done is not frozen until the trial of this action they may not be able to obtain satisfaction from the defendants because the money could be dissipated by Teguh.

Teguh however says that the assignment has been made for commercial reasons and they claim that there are serious disputes as to the validity of Soon Huat's claim entitling them to deny liability.

d It seems to me that the crux of this matter at the present interlocutory stage is whether Teguh has billed the SSI for the work done by Soon Huat and have been paid or are about to be paid for the same. As it appears to be the case that they have billed the SSI, it must follow that the moneys paid or about to be paid for the work done by Soon Huat must go into a suspense account until the disputes between Soon Huat and Teguh have been resolved.

e This view is fortified by the fact that in addition to what I have already said, Teguh in its affidavit does not indicate that it has made any provision for Soon Huat's claim. Furthermore their denial of liability has so far not been supported by any documentary evidence that there were any serious disputes as to the quality of Soon Huat's performance while the work was in progress. These factors taken in the light of all the circumstances of the case has led me to the conclusion that the proper order to make at this interlocutory stage is as follows.

f Teguh is hereby restrained from receiving any further moneys due to it from the Perbadanan Setiausaha Negeri Selangor under the Contract No. 4/416 until it has deposited the sum of RM159,106.89 into Court or alternatively given security for this sum to the satisfaction of the plaintiff, such payment or security to abide the trial of this action or further order.

g The parties shall have liberty to apply because the plaintiff may now apply for summary judgment since his is a liquidated claim and the respective merits of the parties can be tested if necessary by cross-examination before it is decided on what terms the defendant should be given leave. If the leave obtained is unconditional the defendant can of course have the present order vacated.

This order is subject to the plaintiffs undertaking as to damages as set out in para 3 of the summons in chambers.

h The costs will be costs in cause.

Also found at [1992] 1 CLJ 525

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